Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review	)	CC Docket No. 02-39
of the Equal Access and Nondiscrimination	)	
Obligations Applicable to Local Exchange	)	
Carriers	)	

REPLY COMMENTS OF QWEST SERVICES CORPORATION

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Qwest Services Corporation ("Qwest"), through counsel, hereby files its reply comments in the above-captioned docket.[1]

I. INTRODUCTION AND SUMMARY

In this proceeding the Federal Communications Commission ("FCC" or "Commission") seeks comment on the extent to which the various rules, regulations and consent decree obligations that carry over into the Telecommunications Act of 1996 ("1996 Act" or "Act") by Section 251(g) should remain applicable to incumbent local exchange carriers ("LEC").[2]

Section 251(g) serves a dual purpose. First, it retains the equal access provisions of the MFJ and the GTE consent decrees until these provisions have been superceded by Commission action. Second, Section 251(g) makes clear that the FCC's equal access rules that were effective

[1] *In the Matter of Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, *Notice of Inquiry*, FCC 02-57, rel. Feb. 28, 2002 ("*Notice*"). *Public Notice*, DA 02-588, rel. Mar. 12, 2002.

[2] 47 U.S.C. § 251(g). Section 251(g) provides in pertinent part that: "[E]ach local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carriers on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superceded by regulations prescribed by the Commission after February 8, 1996.

as of February 8, 1996, remain in effect, and it authorizes the Commission to resolve conflicts between them and the 1996 Act. This latter action was not, as was the case with the consent decrees, meant to transition obsolete FCC regulations but to enable the FCC to update its regulations on a timely basis to conform them to the terms of the Act. Thus, Section 251(g) protects the pre-Act FCC rules from immediate supercession by the Act and gives the Commission time to devise its own regulatory equal access structure consistent with the Act. The *Notice* seeks comment on what the Commission should do with the two consent decrees and with any FCC rules carried over by Section 251(g).

In initial comments on the *Notice*, Regional Bell Operating Companies ("RBOC") and other incumbent LECs note that there is no reason to continue in force any parts of the consent decrees, and that the Commission's arsenal of regulatory and statutory tools is more than sufficient to deal with equal access problems when and if they arise. Qwest agrees. Most competitive LECs and interexchange carriers ("IXC"), however, contend that the consent decree restrictions should be retained, citing alleged dramatic equal access problems that have developed and are developing with the entry of RBOCs into the long distance markets under Section 271 of the Act. These commenters fundamentally misunderstand the purpose and scope of Section 251(g), which is not an independent grant of authority to regulate the joint marketing expressly permitted by Congress under Section 272(g).

At the same time, Qwest agrees with many of the commenters that true equal access issues, such as dialing parity and interconnection, remain vital elements of the FCC's regulatory structure.

In these Reply Comments, Qwest addresses several conceptual and analytical mistakes made by certain commenters and suggests that the public interest can best be served by

recognizing that Section 251(g) of the Act is not an independent grant of authority but rather is a limited transitional mechanism adopted by Congress. There is no reason to continue in force the consent decree restrictions carried forward by Section 251(g) because they have been rendered obsolete by the more current regulations adopted by the FCC in its implementation of the 1996 Act.

II. THE FCC SHOULD EXPRESSLY RULE THAT THE MFJ AND THE GTE CONSENT DECREES HAVE BEEN SUPERCEDED BY THE REGULATORY STRUCTURE ADOPTED BY THE FCC SINCE ENACTMENT OF THE 1996 ACT

Contrary to the protestations of many commenters, there is no reason to continue the equal access provisions of the MFJ or the GTE consent decrees. The FCC's equal access rules are extensive and comprehensive, and the decrees, now nearly twenty-years old, are either unnecessary or counterproductive. Some commenters, however, support the continuation of these decree provisions under Section 251(g) on the assertion that RBOCs still possess market power, and that the continuation of the decrees will somehow serve to combat that market power. These commenters fail to explain why the Commission's existing regulations are inadequate to address these concerns, even if valid.

Those commenters basically confuse and commingle the applicability of Section 251(g) to the MFJ and applicability of this section of the Act to the FCC's rules and regulations. Reasoned analysis demands that these two aspects of Section 251(g) be recognized as separate issues. The Act was intended to supercede the MFJ and the GTE consent decrees, and Section 251(g) gave the FCC time to enact its own equal access regime under the Act. The Commission has now done so, and should now declare that the MFJ and the GTE consent decree no longer have any vitality.

The material difference in the application of Section 251(g) to the two consent decrees superceded by the Act[3] and the panoply of FCC regulations that remain in force and effect or were adopted following the passage of the 1996 Act is apparent. Congress expressly intended to supercede the two decrees, and the language of the Act does so explicitly. 47 U.S.C. § 601(a)(1) and (2). Accordingly, the equal access provisions of the two decrees remain in effect only on a transitional basis pursuant to Section 251(g). The time has come for the Commission to declare that the left-over equal access provisions in the consent decrees are no longer necessary. At the same time, Congress did not intend to supercede existing federal regulations. 47 U.S.C. § 261(a). Section 251(g) preserves the extant FCC regulations as well as those the Commission adopts under the 1996 Act.

Contrary to a clear reading of Section 251(g) and its application to the rest of the Act, most commenters supporting continuance of the MFJ's and GTE consent decree's equal access requirements base their arguments on general claims of danger to competition if RBOCs are permitted to discriminate against competitors in various situations. However, these commenters do not specify why the FCC's own rules and regulations cannot deal with any specific case of discrimination that does arise in an anti-competitive context. And this is key. The FCC can promulgate, and has promulgated, rules that are capable of dealing with actual threats to competition: If conditions change, then the FCC should modify those rules.[4] This approach is clearly the intent of Section 251(g) of the Act.[5]

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[3] Actually three decrees were superceded by the Act. 47 U.S.C. § 601(a). However, the McCaw consent decree has no relevance to this proceeding.

[4] Indeed, the Commission should continue to review the market for local telecommunications services in order to fine tune its equal access rules consistent with Congressional direction to deregulate telecommunications to the extent feasible.

[5] *See WorldCom, infra*, at note 9.

Sprint contends that the consent decrees should be continued in effect because no one knows exactly what is in them. But this claim underscores the importance of clarifying the equal access rules by confirming that the consent decrees no longer apply. According to Sprint, there may be provisions in the decrees that no one is aware of and that might add to the Commission's enforcement ability should something unanticipated arise in the area of equal access or competition.[6] But continuing the confusion and uncertainty conceded by Sprint is not in anyone's interest. If Sprint or any other party can identify a shortcoming in the Commission's existing regulations, it is free to petition the Commission for clarification or a rulemaking. The solution cannot be to resurrect a body of regulations whose content is unknown. At bottom, Congress's intent in passing the 1996 Act was to encourage competition in all markets and to move regulation of equal access and other issues that arise with respect to telecommunications from the judiciary to an expert administrative agency, not to leave the consent decree provisions in place 'just in case.'

The Commission should declare these decrees superceded in their entirety.[7]

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[6] Sprint at 4.

[7] Such a ruling would, under the circumstances, be more than sufficient to meet the "explicitly superceded" language of Section 251(g). This language merely requires conscious supercession by the FCC based on a record and reasoned decision making. It does not require that the FCC adopt new rules or replace each aspect of the consent decrees with a specific rule. The Sprint comments well document that such an approach would not be feasible or reasonable.

Furthermore, the FCC should resist the call of commenters to impose additional equal access rules. Congress directed the FCC to review all of its rules on a biennial basis to determine which rules are no longer necessary or productive, 47 U.S.C. § 161. Thus, the FCC is under an ongoing mandate to review its rules to determine which ones should be eliminated or modified. However, unlike the assumption that the consent decrees covered by Section 251(g) are meant to be transitional only, a key purpose of Section 251(g) as it applies to FCC regulations is to ensure that conflicts between the Act's requirements and preexisting FCC rules do not result in regulatory uncertainty while the FCC enacts its own regulatory system under the 1996 Act.

III. THE COMMISSION SHOULD RECOGNIZE THAT THERE IS A MATERIAL DIFFERENCE BETWEEN EQUAL ACCESS RULES GOVERNING ACCESS TO ESSENTIAL INCUMBENT LEC FACILITIES AND RULES GOVERNING THE MARKETING AND OTHER ASPECTS OF INCUMBENT LEC SERVICES

The comments say surprisingly little about the necessity of rules governing equal access as that term was initially envisioned -- the technical ability of IXCs to access local exchange networks and customers, and the ability of local exchange customers to access IXCs.[8] Instead the focus of commenters is almost exclusively on the ability of RBOCs to market interexchange services and local exchange services jointly -- an activity that is expressly permitted by the Act without conditions other than satisfaction of the requirements of Section 271 provisions. 47 U.S.C. § 272(g). Accordingly, while RBOCs that receive Section 271 authority for the provision of interLATA services are clearly covered by a wide array of equal access provisions (most arising under Sections 201(a), 251(a), (b) and (c) and 272 of the Act), none of these restrictions bears any relationship to Section 251(g).

The fact that Section 251(g) is limited in scope does not mean that an RBOC's provision of long distance service is not subject to the FCC's jurisdiction, or that an RBOC providing interLATA service may provide superior access to its long distance affiliate than it does to competitors. These issues are covered extensively in the RBOCs' plans for long distance service submitted under Section 271 of the Act and the rules and regulations promulgated pursuant to Section 272 of the Act. Such rules cannot, however, be based upon an extension of the consent decree restrictions carried over by the status quo-preserving provisions of Section 251(g) of the Act.

[8] The original equal access rules are set forth in Appendix B of the MFJ. *See United States v. AT&T*, 552 F. Supp. 131, 195 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 103 S.Ct. 1240 (1983).

Joint marketing issues should not be confused with true equal access issues.[9] It makes sense to review the technical equal access rules in order to harmonize them and make them more rational. There are numerous equal access rules in effect and under consideration, as noted in both the *Notice* and the initial comments. For example:

- 1+ and 0 dialing technical and ordering requirements. 47 U.S.C. § 251(b)(3).
- The requirements that all LECs, including competitive LECs, interconnect with IXCs on terms and conditions that are just and reasonable. 47 U.S.C. §§ 201 and 251(a).
- The Open Network Architecture rules as applied to telecommunications services subject to Title II of the Act.

But RBOC marketing activities, including the joint marketing of local and long distance services, do not implicate equal access. Moreover, regulation of joint marketing is unwarranted and would have adverse impacts on the proper functioning of the market. There is no serious claim that any marketing advantage purported to be enjoyed by the RBOCs causes customers to

[9] Indeed, given the Court of Appeal's finding that Section 251(g) is not a separate grant of authority, the IXCs mistakenly argue that the Commission may use that provision of the Act to apply the MFJ's equal access provisions to the RBOCs. AT&T at 21-26; NASUCA at 3-6; WorldCom at 1-3. It is incontrovertible that the equal access provisions of the MFJ had nothing to do with RBOC provisioning of interLATA services, which were flatly prohibited under that decree. Thus, because at the time of passage of the 1996 Act RBOCs were precluded from providing interLATA services, there were no equal access rules under the MFJ to carry over to the RBOCs' interLATA services pursuant Section 251(g). This conclusion was confirmed by the Court of Appeals for the District of Columbia Circuit in *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir., May 3, 2002). In the order on review in *WorldCom*, the FCC had addressed the issue of "ISP reciprocal compensation" through rules assertedly carried over from the pre-Act regime under Section 251(g) of the Act. However, the Court held that the FCC could not use Section 251(g) in this manner. Rather, this section of the Act, noted the Court, was a device to maintain the *status quo ante* pending further FCC rules adopted under the Administrative Procedure Act; Section 251(g) was not a grant of regulatory authority in itself. The Court held that Section 251(g) neither promulgates new rules nor allows the Commission to promulgate new rules. Instead, new FCC regulations must be adopted pursuant to other provisions of the Act and the Administrative Procedure Act. Accordingly, Section 251(g) has no equal access rules to carry over in this area -- the MFJ simply does not apply.

be in any way confused about the availability of the offerings by competitive providers of long distance service.[10]

Furthermore and most importantly, the Act itself recognizes the significant consumer benefits that joint marketing activities can provide by carving out an express exception for RBOC joint marketing activities even while the Section 272 non-discrimination rules are otherwise in full force and effect. 47 U.S.C. § 272(g). This statutory exclusion of joint marketing activities from the non-discrimination provisions of Section 272(c) of the Act constitutes an explicit recognition by Congress of the public benefits that joint marketing can permit.

Nevertheless, a variety of parties attack even the limited joint marketing permission, offering as their main "evidence" the fact that several RBOCs have been successful at attracting long distance customers after having been granted permission to offer interLATA service. The claim here is that customers really do not desire to purchase RBOC long distance services, and that they would not do so in the absence of some sort of unlawful (or at least suspect) advantage by the RBOCs in marketing their long distance services.[11] This claim is simply not credible. Preliminarily, there is no evidence that the success of these RBOCs is due to anything other than quality, value and other legitimate bases for competition. Moreover, the RBOCs have not suddenly become dominant players in the long distance market. They, in fact, do not approach a market share as large as AT&T's. While, as noted above, there remain sound reasons for the

[10] Moreover, the emergence of cable television service as a provider of competitive telecommunications services cannot be ignored in any study of the telecommunications marketplace.

[11] *See* WorldCom at 3-4, in which WorldCom argues that anti-competitive action is documented because Verizon achieved a specified level of market penetration far more quickly than did MCI. An assertion of anti-competitive marketing practices based on market success alone is bizarre.

FCC to continue its involvement in the technical aspects of interconnection and equal access, there is no economic or public policy reason for the FCC to regulate incumbent LEC marketing of its long distance services.

IV. AT&T'S ATTACK ON QWEST'S POLICY ON LOCAL SERVICE FREEZE AND PIC FREEZE IS INACCURATE

AT&T contends that incumbent LECs use their local service and primary interexchange carrier ("PIC") freeze services to inhibit a customer's ability to change from the incumbent LEC to another provider of local or long distance service. AT&T singles out Qwest as a primary target of allegations concerning PIC and local service freezes (or "LSF").[12] AT&T's allegations are wholly without foundation. This Commission has expressly rejected AT&T's basic position, that "preferred carrier freezes," which include freezes pertaining to local service, are inherently anticompetitive. Specifically, the Commission has held in the context of local service that preferred carrier freezes provide public interest protection against unwanted service changes.[13] In Qwest's local exchange territory, some state regulators and legislators *demand* that this option be made available to customers.[14] Especially in light of these states' mandates, AT&T's

[12] AT&T at 31-32.

[13] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, *Second Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd. 1508, 1576-77 ¶ 114 (1998), *appeal dismissed as moot, sub nom. MCI WorldCom, Inc. v. FCC*, No. 99-1125 (D.C. Cir., Aug. 25, 2000); *on further recon.*, 15 FCC Rcd. 15996 (2000).

[14] Washington: In the Matter of Amending WAC 480-120-139 Relating to Changes in Local Exchange and Intrastate Toll Services, January 14, 2000; Colorado: In the Matter of Proposed Amendments to the Rules Regulating the Changing of Presubscription, Rule 25, Rules Regulation Telecommunications Service Providers and Telephone Utilities, 4 CCR.723.2, January 8, 1999, Docket No. 98R-379T; Utah: 54-8b-18, Utah Code Annotated 1953 with support of Utah Public Service Commission, House Bill 185, signed into law March 17, 1999.

suggestion that local service freezes are anti-competitive devices meant to discourage customers from switching LECs is simply not accurate.

V. CONCLUSION

Section 251 carried over the equal access provisions of the MFJ and the GTE consent decrees only until such time as the Commission rules that those decrees are no longer necessary to protect the public in light of the Commission's existing regulations. That time has arrived. The Commission should declare that the equal access provisions of the consent decrees are no longer necessary. The Commission's current authority to address issues of equal access are sufficient to protect the public. In no event need the Commission extend those regulations or limit the RBOCs' joint marketing of long distance and local service.

Respectfully submitted,

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June 10, 2002

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **REPLY COMMENTS OF QWEST SERVICES CORPORATION** to be filed with the FCC via its Electronic Comment Filing System, an electronic copy of the **REPLY COMMENTS** to be served, via email, on the parties listed below, and eight hard copies to be delivered to Ms. Julie Veach.

Richard Grozier
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June 10, 2002

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